U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: **September 28, 2000**

CASE NO.: **2000-INA-145**
CO NO.: **P1997-NJ-02106504**

In the Matter of:

UNITED PROFESSIONAL HOME DECORATING, INC.
Employer

on behalf of

RIGOBERTO LEDESMA
Alien

Certifying Officer: Dolores Dehann,
New York, New York

Appearance: Ludovico Aprigliano, Esquire
Morristown, New Jersey

Before: Burke, Wood and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C.§ 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United`States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

Statement of the Case

In January 1996, the Employer filed an *Application for Alien Employment Certification* (ETA 750) to permit the employment of the Alien as a Painter. The Employer listed the wage being offered in the ETA 750 as $12.50 per hour, with overtime of $18.75 per hour. (AF 34-38).

The agency responsible for the initial processing of the application (State Agency) notified the Employer that there were several discrepancies therein. These did not include any question regarding the Employer's wage offer. Corrections were made to the ETA 750 and, as approved by the State Agency, the position was advertised at the $12.50 per hour wage. The Employer reported, in substance, that his recruitment efforts did not produce a satisfactory candidate and the file was referred to the CO for a determination. (AF 44-46).

Upon review of the record, the CO questioned the wage offered by the Employer and remanded the case to the State Agency for a new determination under the Service Contract Act rate for maintenance painters. (AF 47-48). Subsequently, the State Agency determined that the current rate, set in July 1997, was $17.60 per hour. It was noted that the rate had been $16.45 at the time of processing. (AF 49-57).

The CO issued a Notice of Findings (NOF) on September 4, 1998, proposing to deny the application on the basis that the Employer's wage offer of $12.60 per hour was below the prevailing wage of $17.60 per hour as determined under the Service Contract Act wage in the area of intended employment. (AF 58-59). The Employer was offered the opportunity of amending its wage offer and readvertising the position or submitting evidence to show that the wage determination was in error. (AF 59).

Counsel for the Employer responded to the NOF by contending that as the application had been pending for about two years and the State Agency did not find the wage offer to be in error, it would be unfair to require the Employer to re-advertise the position. He contended also that the appropriate wage should be that which was in effect at the time of the original advertising. (AF 60-67).

The CO responded on January 14, 1999, stating that the Department of Labor was not bound by determinations made by the State Office and again extended the offer to permit increasing the wage to $17.60. (AF 75). The Employer thus amended the ETA 750 to show a rate of pay of $17.60 and the case was remanded to the State Agency for monitoring of the Employer's new recruitment.

A copy of the Employer's new advertisement and job posting of record shows that the Employer continued to offer a base wage of $12.50 per hour. (AF 87). In a report of the new recruitment the Employer stated, in pertinent part, that he had interviewed Peter Rotonelli and discussed his qualifications in detail. During the interview the applicant stated that he was expecting to be paid

$18.00 per hour regular time and when told that the wage was $12.50 per hour, he appeared to be hesitant to want to pursue the job opening. He called a few days later and left a message that he was not interested in the position. (AF 96-97).

A second NOF was then issued by the CO again proposing to deny the application on the basis, *inter alia*, that applicant Rotonelli had been rejected for other than lawful job-related reasons in that he had been offered a wage of only $12.50 per hour. The CO advised that the Employer could rebut the NOF by providing documentation that the applicant was not qualified for the position. (AF 99-101).

The Employer's counsel responded to the second NOF. He represented that the advertisement and posting was in error due to an inadvertence by his office and that the reason the Employer used the incorrect wage was that he was incorrectly advised by his office regarding the same. He also presented other possibilities for the applicant's rejecting the position and contended that he was not qualified in any event. (AF 102-113).

Finding the response by counsel to be inadequate, the CO issued a Final Determination denying certification. (AF 114-115). Employer then requested reconsideration and, in the alternative, a review by this Board. (AF 130-34). The reconsideration motion was denied and the record was submitted to the Board for review. (AF 137).

Discussion

Section 626.20 (c)(2) provides that an employer's wage offer must be equal to the prevailing wage as determined under § 656.40 at the time the alien starts work. As the Act and regulations contemplate that an alien will not begin work for the employer until certification is issued, it follows that the prevailing wage offered by the employer shall be that in effect at the time of certification. The Employer has submitted no evidence to show that the prevailing wage of $17.60 was incorrect. Indeed, he conceded its correctness by amending the ETA 750 to reflect this rate.[1]

Section 656.21(b)(6) of the regulations provides:

> If U.S. workers have applied for the job opportunity, the employer shall document that they have been rejected solely for lawful job-related reasons.

Originally, Employer reported having interviewed Mr. Rotonelli and having discussed his qualifications. He made no mention that the applicant was not qualified for the position for any reason. Rather, Employer specifically stated that the applicant rejected the position because of the low salary

[1]We note that the CO was correct in pointing out that she was not bound by any prior wage determination of the State Agency. *Aeronautical Marketing Corp.* 1988-INA-143 (Aug. 4, 1988). We also note that the Employer's initial wage offer was substantially below the Service Contract Act wage in effect at the time of its initial recruitment.

offer, *i.e.*, Employer's initial wage rate that had been determined to be below the prevailing wage.[2] The failure to offer the job to a U.S. worker at the salary listed constitutes an unlawful rejection. *Produce Management Serv.*, 1991-INA-96 (May 13, 1992).

Accordingly, the CO properly denied certification in this case.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

[2] We fail to see where there could have been any misunderstanding by the Employer regarding the prevailing wage as he purportedly agreed to amend the ETA 750 to reflect the same.